IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

ROBERT L. MEYER, Administrator of the Estate of AMALIE MEYER, Deceased, ROBERT L. MEYER and ALBERT L. MEYER,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

No. 514 - 515

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Seventh Circuit
and

BRIEF IN SUPPORT THEREOF.

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Cases Cited.

Statutes Cited.

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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States of America, and to the Associate Justices of the Supreme Court:

Your petitioners, Robert L. Meyer, administrator of the estate of Amalie Meyer, now deceased, and Robert L. Meyer and Albert L. Meyer, respectfully show to this Honorable Court, that because of the facts hereinafter stated, they pray that a writ of certiorari issue out of this court to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in a certain cause

numbered on the docket of said Court of Appeals as 7148 and 7149, and entitled United States of America v. Amalie Meyer et al., and affirming the judgment of the District Court of the United States for the Southern District of Illinois, Southern Division.

OPINIONS BELOW.

No opinion of said District Court of the United States was filed or entered of record. The opinion of the said Circuit Court of Appeals for the Seventh Circuit is contained in the record volume II, page 1179, and is also reported in the 113 Fed. (2), page 387.

JURISDICTION.

The said judgment of the Circuit Court of Appeals was entered June 12, 1940 (Vol. II, page 1179). A motion for rehearing was filed in said Court of Appeals on the 27th day of June, 1940, and taken under submission (Vol. II, page 1193), and was denied by said Court of Appeals July 23, 1940 (Vol. II, page 1209). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

BRIEF SUMMARY STATEMENT OF THE MATTER INVOLVED.

The United States of America filed its petition in the District Court of the United States for the Southern District of Illinois, Southern Division (in which district the land herein involved is located), on June 1, 1937, to acquire by condemnation the **fee-simple title** to a large area, 2,476 acres out of a unit farm of 3,300 acres, owned by your petitioners, situated in the Illinois River valley and in Calhoun

County, Illinois, and stretching for five miles along the right bank of the Illinois River, from a point five miles above the mouth of the Illinois River at its junction with the Mississippi River to a point ten miles above said mouth, for an alleged authorized use, in connection with a dam on the Mississippi River at Alton, Illinois, and distant more than twenty miles below said lands, called "Lock and Dam No. 26"; and alleging therein, that said land has been authorized by Congress to be acquired and condemned **in fee-simple absolute**, and "that it is necessary and **advantageous** to the United States to acquire the unqualified fee-simple title thereto" (R. Vol. I, p. 2), and further alleging that the following Acts of Congress authorize the taking by the United States of America of the **fee-simple title** to petitioners' said lands:

> An Act to Facilitate the Prosecution of Works Projected for the Improvement of Rivers and Harbors, approved April 24, 1888 (25 Stat. 94), being Section 591 of Title 33, United States Code Annotated.
>
> An Act Authorizing Condemnation of Land for Sites of Public Buildings and for Other Purposes, approved August 1, 1888 (25 Stat. 357), being Section 257, Title 40, United States Code Annotated.
>
> An Act of Congress, approved the 3rd day of July, 1930 (46 Stat. 918-927), Public Document No. 520, 71st Congress, entitled "An Act Authorizing the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for Other Purposes."
>
> House Document No. 290, 71st Congress, Second Session.
>
> An Act Authorizing the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for other Purposes, Public Document No. 520, approved July 3, 1930, relating to the Mississippi River between the mouth of the Illinois River and Minneapolis and between Grafton, Illinois, and the northern boundary of the City of St. Louis, Missouri, as

amended by an Act of Congress, approved February 24, 1932, being Public Resolution No. 10, 72nd Congress, H. J. Res. 271.

An Act Authorizing the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for Other Purposes, approved August 30, 1935, and being House Document No. 409.

An Act of Congress, approved August 2, 1861 (12 Stat. 285), and as amended by an Act of Congress, approved June 22, 1870 (16 Stat. 164), being Section 306 of Title 5, United States Code Annotated.

An Act of Congress, approved March 3, 1875 (18 Stat. 470), and as amended by an Act of Congress, approved March 3, 1911 (36 Stat. 1091), being Section 41 of Title 28, United States Code Annotated.

Your petitioners filed a motion to dismiss this petition on the 4th day of September, 1937 (R. Vol. I, p. 82).

Among the grounds for the dismissal of the petition, was the following:

"These defendants jointly further state, and pray to be permitted to prove and establish by competent evidence, first, upon information and belief, that the Lock and Dam No. 26 is distant more than, to wit, twenty miles below the location of their said land in Calhoun County, Illinois, and, therefore, is not a part of any land that Congress authorized the Secretary of War to condemn **in fee**, and does not, and cannot constitute land which Congress authorized to be condemned **in fee**, and which is, **in good faith**, required for the construction, operation or maintenance of said Lock and Dam at Alton; nor for access thereto, and distant twenty miles from said land in Calhoun County; and that the sole and only right and authority granted by Congress (if any), was to authorize the overflow of said land and formation of a still pool above said dam, and to pay the damage caused by such an overflow, and to take a perpetual **easement** to overflow to the

maximum elevation of said dam at Alton (R. Vol. I, p. 90).

* * * * * * *

"Further these joint defendants, owning and in possession of said tracts of land, as above stated, expressly deny that the Secretary of War is authorized by anyone, or all of the several Acts of Congress stated in said petition, to condemn **in fee simple** any of the lands of these defendants located, as above stated, and more than, to wit, twenty miles above said Lock and Dam No. 26, at Alton, Illinois; and further expressly deny that the Act of Congress, approved July 3, 1930 (46 Statutes 918-927), Public Document No. 520, 71st Congress, entitled 'An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors,' authorizing works of improvement to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers in the **Mississippi** River between the mouth of the Illinois River and Minneapolis, and between Grafton, Illinois, and the northern boundary of the City of St. Louis, Missouri, to provide a channel depth of nine feet at low water mark with width suitable for long haul common carrier service, to be prosecuted in accordance with the plans submitted in House Document No. 290, 71st Congress, Second Session, as stated on page 2 of plaintiff's petition, contains **any** authority whatever, or in any manner authorizes or empowers the Secretary of War to take **in fee**, the lands of these defendants located, to wit, twenty miles above Alton and bordering upon the Illinois River and **not** upon the **Mississippi** River" (R. Vol. I, pp. 91, 92).

Said motion to dismiss further expressly denied that the Secretary of War was authorized by any one, or all of the several Acts of Congress referred to in the petition, to condemn **in fee** any of the lands of these petitioners, and stating that said Acts of Congress limited the title and estate

to be taken in their lands, to a perpetual **easement** to overflow said lands (R. Vol. I, pp. 91, 92, 93).

Petitioners also filed a cross petition for damages to 800 additional acres of adjacent and surrounding lands jointly and similarly owned as part of a unit farm, totaling 3,300 acres, owned by them, not sought to be taken in the condemnation proceedings, but which would be damaged by the permanent use to be made of the portion sought to be taken (R. Vol. I, p. 157).

A hearing was made on this motion to dismiss on January 27, 1939 (R. Vol. I, p. 107). On the same date the Court made and entered an order denying said motion to dismiss, to which defendants excepted (R. Vol. I, p. 129). Later a jury trial was had on the petition for condemnation of the land, and on the petitioners' cross petition for damages to said additional 800 acres, part of the unit farm of 3,300 acres (no answer being required under the Illinois practice in condemnation proceedings), beginning on the 16th day of May, 1939, and ending on the 3rd day of June, 1939 (R. Vol. I, p. 183, to Vol. II, p. 1125). The jury rendered a verdict for the petitioners in the sum of $66,750.00 (R. Vol. II, p. 1125), upon which judgment was entered on the 14th day of June, 1939 (R. Vol. II, p. 1142), for the taking of the absolute unqualified **fee-simple title** in and to the aforesaid property of 2,476 acres of your petitioners.

Thereafter, on June 6, 1939, your petitioners filed a motion for a new trial (Vol. II, page 1135), containing an assignment of errors, among which was an exception saved by defendants to the Court's charge to the jury, (Vol. II, pages 1012 and 1018) and to that portion of the charge, which in effect stated, that the Government was not liable for any direct damage and injury done to the said remaining surrounding and adjacent 800 acres of land owned by the defendants, caused and occasioned by permanently rais-

ing and holding the natural level of the water of the Illinois River up to the ordinary high water mark; and was, therefore, only liable for such direct damages, as might be inflicted upon said land from raising and permanently holding the waters of the Illinois River above the high water mark; and that, therefore, it is only for such damages as are caused by the raising of the natural water level above high water mark, that the Government must make recompense or reparation; and that the United States may, for the improvement of navigation, permanently raise the natural water level to the ordinary high water mark, without liability to pay compensation therefor. Specific exceptions to said portions of said charge were interposed by the petitioners when said instruction was given the jury (Vol. II, pages 1019, 1020).

Petitioners appealed from said judgment to the United States Circuit Court of Appeals for the Seventh Circuit on August 30, 1939 (Vol. II, page 1154). Among the errors assigned on said appeal were the following:

I.

1. The Acts of Congress pleaded in the petition do not authorize the taking of a fee-simple title to the petitioners' land, but, on the contrary, when properly construed and interpreted, specifically provide for the taking of a permanent "flowage easement" only in and to said land.

2. That the trial court erred in instructing the jury and in overruling petitioners' exception to said charge, that the Government was not liable for permanently raising and constantly maintaining the natural level of the waters of the Illinois River up to the high water mark, and thereby directly damaging said remaining and surrounding lands of petitioners; and that it was only liable for damages sustained by said land from permanently raising the waters above the high water mark.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals for the Seventh Circuit erred:

1. In holding that said Acts of Congress authorized the taking of the **fee-simple title** to petitioners' land.

2. In holding that the Government is not liable for direct damage to the adjacent lands of the petitioners occasioned by, and due to permanently raising the waters of the Illinois River **up to** the high water mark, and is only liable for direct damage to said remaining lands due to permanently raising the waters of the Illinois River **beyond** the high water mark.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The said Court of Appeals for the Seventh Circuit has, by its decision in this case, probably erroneously decided an important question of Federal law that has not been, but should be, settled by this Court; in that it has established a far-reaching, and probably erroneous decision, involving the property rights of **thousands** of owners of land bordering on the Mississippi River and Illinois River, by its construction and interpretation of the said **general** and **special** Acts of Congress, Federal laws, heretofore enumerated in "the brief summary of the matter involved" which are the alleged basis of Congressional authority for this and many hundreds of similar still pending condemnation suits. And has probably erroneously failed, in construing and interpreting said **general** and said **special** Acts of Congress, to follow the applicable decisions of the Supreme Court, announcing the proper principles of construc-

tion and interpretation, and the proper legal effect to be given to a **general** Federal law, when the subject matter of said **general** law, is in conflict with a subsequently enacted **special** law, which deals with the same subject matter, as announced and laid down by **this Court** in its previous decisions (hereinafter mentioned):

(a) Said Court of Appeals has decided, (Vol. II, pages 1179-1180) and by its decision has probably erroneously interpreted and construed the **general** Act of Congress, approved April 24, 1888, (25 Stat. 94) being Section 591, Title 33, U. S. C. A., (which is entitled "An Act to **facilitate** the prosecution of works projected for the improvement of Rivers and Harbors"), to constitute an unlimited, and **express** grant and delegation by Congress, of its entire legislative discretion, to the Secretary of War; and to empower and grant to said Secretary of War, its entire legislative discretion to select and condemn **any** and all land, and any interest or estate therein, that **he**, the Secretary of War, determines "is necessary," for **this** River and Harbor Project authorized by Congress.

(b) And further decides (under such a construction of said **general** law), that this grant of legislative discretion is not limited by the several subsequent **special** Acts of Congress, which are the sole and only laws that **expressly** authorize **this** particular project; and decides that said **special** Acts authorizing this particular project, contain no limitation or expressions of Congress, showing an **intention** of Congress, to limit the power granted under said **general** law, approved April 24, 1888, and has erroneously decided that the language used, and provisions made, by Congress in said subsequent **special** Acts, whereby it authorized **this** particular project, and put him in motion, is to be deemed a mere "discussion of the legislation providing for the improvement here concerned, between members of Congress, and other Government officials"; and, therefore, said **spe-**

cial laws are not to be construed as an expression of **intention** by Congress to limit in any manner the power previously granted by the said **general** Act of April 24, 1888, giving him (as the Court of Appeals holds) unlimited authority to acquire **any** land, or right of way, and to decide whether a "fee-simple title" or a mere "flowage easement" therein is "needed," to enable him to maintain, operate, or prosecute THIS particular project; and further decides that in the absence of bad faith, or abuse of that unlimited discretion, such determination **by him** is not subject to judicial review, and is final.

And, therefore, decides that the **special** subsequent and later Act, approved July 3, 1930 (46 Stat. 918, 927), being Public Document No. 520, 71st Congress (which adopts and authorizes the prosecution of the work, "in accordance with the plans and recommendations of the Chief of Engineers, the Board of Engineers of Rivers and Harbors, and the War Department, submitted to Congress in House Document No. 290"), and the provisions of the **special**, subsequent and later Act of Congress, approved February 24, 1932, being Public Resolution No. 10 (which **amends** said above **special** Act of July 3, 1930) and expressly provides:

> "That the work shall be prosecuted in accordance with the plan for a comprehensive project to procure a channel of nine-foot depth, submitted in House Document No. 290, 71st Congress, **or** such modifications thereof as **in the discretion of the Chief of Engineers may be advisable**":

And the Act approved July 30, 1935, being House Document No. 409, 74th Congress (which "adopts and authorizes" the prosecution of the work recommended by the Chief of Engineers, and submitted to Congress in House Document No. 137, 72nd Congress), and in House Document No. **184**, 73rd Congress, are **all** to be deemed, "mere discussions between members of Congress and other Government offi-

cials," and not an expression of the **intent** of Congress, and, (Vol. II, page 1180) (as stated in the opinion of said Circuit Court of Appeals),

> "do not persuade us, that Congress by said later Acts, intended to limit in any manner the power previously granted to the Secretary of War to acquire the fee-simple title for any authorized purpose when deemed necessary."

Which said Document No. 290 and Public Resolution No. 10 and No. 137 contain the detailed plan of the twenty-six dams authorized to be erected in the **Mississippi** River, between the mouth of the Missouri River and Minneapolis, Minnesota; and said Document No. **184** expressly and separately authorizes the Alton Lock & Dam No. 26, and other dams in the **Illinois** River between Grafton, mouth of the Illinois River, and Chicago.

Said first three documents disclose the **intent** of Congress and what it was requested to adopt, and authorize to be prosecuted **in the Mississippi** River, and contain an estimate of the entire detailed **cost** of the **proposed** project on the Mississippi River, including the detailed **cost** of each area of the land constituting the twenty-six dam **sites**, and of ingress thereto and egress therefrom, and also in minute detail, describe the acreage extent of the area that "will be **overflowed** and **damaged**" by **each** of the twenty-six dams (due to the still, and permanent pools that will be formed by each said dam); and also contain **in detail** the nature and classification, and kind of lands and property, that will be "damaged" thereby; and the estimated amount that "will have to be paid for **flowage damage**, to the cities, towns and villages, and for bridges, railroads and highways, and other structures, and to agricultural lands, summer resorts, timber and brush lands, for **flowage damages**"; showing also the plans that had been prepared by the Chief of Engineers "to prevent and reduce **damage** to

cities, towns and villages by the erection of protective structures"; and in all such instances the plans "to reinforce or modify such structures to the new condition"; all followed by a tabulation, in which the total areas "to be **overflowed** and **damaged**" in the various classifications "on which it is assumed flowage damage will be paid, together with **related flowage** damages," are **all** separately stated, for each of the dams in the **Mississippi** River; and under separate items "the total **cost** of **flowage**, including overhead, surveys, etc., is estimated" (stating the estimated amount); and giving that "**flowage damage,**" separately for **each** said dam.

The above proposals and requests **for** authority, as submitted to Congress by the Secretary of War and Chief of Engineers, to prosecute this particular project, together with the recommendations of the Secretary of War, the Chief of Engineers and the Board of Engineers for Rivers and Harbors, disclosing the **entire** scope and estimate of the **entire total cost** of the proposed project in the Mississippi River, from the Missouri River to Minneapolis with the above detail, are all contained in said House Document No. 290, and in said House Document No. 137; and are **separately** enumerated, in minute detail, in House Document No. **184** where the estimated entire and total **cost**, scope, and area proposed to be overflowed by the Alton Pool, **in the valley of the Illinois River**, by the erection of the **Alton Dam**, are also **specifically** stated, and wherein, at page 53 of paragraph 109 of said Document No. 184 is the following:

> "109. **Proposed** pool between Grafton and La Grange—In the estimate of costs it has been assumed that the dam to be built in the Mississippi River at or near Alton will furnish a pool elevation at Grafton of 419 feet above mean sea level. This will eliminate the necessity for building a new lock and dam to replace the existing lock and dam at Kampsville, 31.5 miles

above Grafton. The estimates for this section **include** the cost of **flowage easements** for all lands in the Illinois River Valley, which will be **damaged** by the Alton Pool. Above the present Kampsville Dam the new pool level created by the Alton Dam will be about one foot lower than the present water surface above the Kampsville Dam, so that **no flowage easements are required** between Kampsville and La Grange."

And at page 54, paragraphs 116 and 117, as follows:

"116. Studies were made to develop a plan of improvement which would provide a dependable nine-foot channel without excessive velocities at a reasonable cost from St. Louis upstream to the proposed site of dam No. 25 on the Mississippi River, and to La Grange on the Illinois River. A reasonable cost required that excessive **flowage damages** should be avoided in adopting pool elevations, and that flow heights should not be raised.

"117. It became necessary in the study of the dam located below the confluence of the Illinois and Mississippi Rivers to investigate the question as to whether the manipulation of the discharge gates for the purpose of keeping the proper pool elevation in either river would affect the other river injuriously. The critical condition occurs for a few days in the average year with a minimum flow from the Illinois and a discharge from the Mississippi River at Alton varying from 100,000 to 197,000 cubic feet per second. The latter discharge provides a dependable nine-foot channel depth with open river. At discharges less than 197,000 feet per second, a dam at Alton must maintain a pool level at Grafton of 419 to insure a nine-foot channel depth in the Illinois River to La Grange. It has been ascertained from backwater computations that such level can be maintained by the dam for discharges less than 197,000 cubic feet per second, without causing additional **flowage damage**, since the backwater slopes meet the open river slopes at or below elevation 422, to which **flowage easements are proposed.**"

II.

The Court of Appeals also decided (Vol. II, page 1180) that because of its construction and interpretation of said **general** Act of April 24, 1888, as granting unlimited legislative discretion to the Secretary of War, to decide and determine whether it "is necessary" to take the fee-simple title, or merely "flowage easements" in all lands that would be submerged, overflowed and damaged by said Alton Pool, that HIS determination is **final**, and is not subject to judicial review, in the absence of bad faith, or abuse of discretion. And, further:

(a) Decided (Vol. II, pages 1180 and 1181) (notwithstanding the evidence conclusively and uncontradictally showed) (Vol. I, pages 127 to 128), that the **sole** and **only** use to be **actually** made, and that could **possibly** be made, of defendants' property, was to overflow a portion of it; and also showed that it was all separated from the Illinois River, and "fenced off" from the Illinois River, by a public county road, which runs along the bank of said Illinois River, and traverses the lands of the defendants in such a manner, as to render it a **physical impossibility** to even **enter** upon, and have **access** to said land, from said river, without acquiring said county road; (and that said county road is not being condemned, but is expressly excluded from condemnations); and notwithstanding the further conclusively shown fact,—that was not contradicted, (Vol. I, pages 107 to 128), that 500 acres of the 2,476 acres of land sought to be acquired **in fee** from these defendants, is of such an elevation **above** the said pool, as not to be overflowed or submerged **at all** by the pool; and yet, nevertheless, said Court of Appeals decided, probably erroneously, that **such** evidence was not material, and did not constitute proof of an **abuse** of discretion; since the decision of **such** questions rests wholly in said delegated, unlimited, legislative discretion of the Secretary of War,

and his decision is **final**, and is not subject to review by the Court. And further,

(b) That said Court also probably erroneously decided (Vol. II, page 1181) that a certain letter written by the **Chief of Engineers** to James Hamilton Lewis, United States Senator from Illinois (Vol. I, page 98), dated May 3, 1937 (and therefore **one** day prior to the date of the letter of the Secretary of War to the Attorney-General of the United States, dated May 4, 1937 [Vol. I, page 64] requesting that this proceeding be brought to acquire defendants' land in fee), and which letter was offered in evidence **to support** defendants' contention, that said land was not **in good faith** being condemned as "necessary" for navigation purposes, **was held not competent as evidence**, for the purpose of showing the **abuse** of authority, and the **true use** to be made of said land, when acquired; for the reasons stated by the Court (Vol. II, page 1181):

> "that it was not written by the official who had the burden of determining the question of necessity, but by a subordinate agent, with whom the Secretary may or may not have agreed";

thereby, probably erroneously, giving no effect whatever, to the said **special** Act of Congress, approved February 24, 1932, and being Public Resolution No. 10 (relied on by the Government as **one** of the Acts of Congress authorizing this project), and wherein it is **expressly** recited, that **this** River and Harbor Project, is authorized to be prosecuted,

> "In accordance with the plan for the comprehensive project submitted in House Document No. 290, 71st Congress, Second Session, or such modification thereof **as in the discretion of the Chief of Engineers may be advisable,**"

and excluded, and probably erroneously failed to consider the fact, that **this** letter was written by **that Chief of Engineers**, and discloses his FRANK ADMISSION (Vol. I,

page 98), that the defendants' lands were about to be acquired **merely** to be overflowed and **damaged** by the Alton Pool, and will no doubt be desired for the development of parks and recreational facilities and for wild life conservation; and which letter, [coupled with the above evidence, showing the **physical impossibility** of even having access to the land for navigation purposes, and that 500 acres of it are high **above** the elevation of the Alton Pool], established the contention of defendants, pleaded and relied on; that the taking IN FEE is not only not authorized by Congress, but is an ABUSE of **all** discretion (if any was granted to the Secretary of War); and discloses a complete **lack of good faith**; and established, that under the guise and cloak of "needing" said lands in **fee**, for navigation purposes, they were merely to be overflowed, and were intended to be turned over to **other** departments of the Government, to be used in violation of the River and Harbor Law, for wild life refuges, and recreational parks (2,000 acres of said land, being a wonderful and widely known and expensively improved duck-shooting territory; and said 500 acres thereof high above the elevation of said pool and devoted to valuable corn and wheat crops). And, therefore, **none** of it was "needed" in fee for any legitimate river and harbor project; and if it **might** be "advantageous" to acquire said lands **in fee** for "Wild Life Refuges" or "Recreational Parks," or "a site for a future riverside scenic highway," **such** uses were not such as Congress had authorized the Secretary of War **to consider**, in taking land "necessary" to provide a nine-foot channel for navigation purposes; and that **Congress intended** to **leave** the **fee** title to all land that had **such** values, to the owners, subject ONLY to a perpetual easement to overflow them, upon payment of "**flowage damages.**"

(c) The construction and interpretation of the said **general** law of April 24, 1888, and the legal effect to be **properly**

given the said several **special** laws authorizing **this** project, is in **direct** conflict with the principles and rules of construction laid down by the Supreme Court in the well-settled and long-established cases of

Townsend v. Little, 109 U. S. 504;
Rosecranz v. U. S., 165 U. S. 257;
Rodgers v. U. S., 185 U. S. 83;
Washington v. Miller, 235 U. S. 422,

wherein this Court announces, that it is a fundamental rule of construction and interpretation, that when a **general** statute, if standing alone, would include the same matter as the **special Act**, and thus conflict with it, the **special** Act will **always** be considered an exception to the **general** statute * * * and that even when the **general** statute is of a later enactment, the **special** Act will be construed as an exception to its terms.

(d) The instruction excepted to, wherein the District Court announced to the jury (Vol. II, page 1012):

> "The United States may, in the improvement of navigation, raise the water to the ordinary high water mark without liability to pay compensation therefor."

And again announced (Vol. II, page 1018):

> "Concerning the question of damages caused by the raising of the water of the river up to the ordinary high water mark, the Government is not liable. However, for damages caused a riparian owner from the raising of the water above the high water mark, it is liable. Therefore, it is only such damages as are caused by the raising of the water levels above high water mark that the Government must make recompense or reparation."

And which instruction, affirmed and approved by the said Court of Appeals (Vol. II, pages 1190 and 1191), is probably erroneous, and in direct conflict with, and in **total** disregard of the decisions of the Supreme Court of the United

States, wherein it has been finally and conclusively stated "that the liability of the United States under the Fifth Amendment to the Federal Constitution to make just compensation for an appropriation of land for public use, is not defeated, because such land was taken by the Government, in the exercise of its power to improve navigation."

United States v. Lynah, 188 U. S. 445;
United States v. Cress, 243 U. S. 316;
United States v. Grizzard, 219 U. S. 180;
United States v. C. B. & Q. Ry., 82 Fed. (2d) 131 (C. C. A. for the Eighth Circuit);
United States v. C. B. & Q. Ry. Co., 90 Fed. (2d) 161 (C. C. A. for the Seventh Circuit).

(Note): The above C. B. & Q. cases **each** involved these very **same** Acts of Congress, under which the Government attempted to take property of the C. B. & Q. Railroad, and to damage the balance on the Mississippi River; and wherein the decision of the **Eighth** Circuit Court of Appeals, 82 Fed. (2d) 131, most exhaustively analyzes the liability of the United States, and likewise the said C. B. & Q. case in the 90 Fed. (2d) 161, is also a most exhaustive analysis by this same Court of Appeals for the Seventh Circuit; and we may add, in both cases, the law announced by the Supreme Court in United States v. Lynah and in the United States v. Cress, and in the United States v. Grizzard was all followed; and the United States **held** liable for all damages inflicted by permanently raising the natural level of the Mississippi River and injuring the **balance** of the railway's properly not taken; and, therefore, the **decision** of **this** instant case, as disclosed in this record at volume II, pages 1190 and 1191, is directly in conflict with the opinion rendered by this **same** said Court of Appeals for the Seventh Circuit in said 90 Fed. (2) 161.

(e) The undisputed and **physical** evidence in this record discloses that this Alton Dam creates and maintains a

permanent pool at an elevation of 421 feet above sea level in the Illinois River bordering defendants' land, and that that level will flood and damage 2,000 acres of the 2,476 acres, attempted to be taken in fee, but will not flood the remaining 476 acres so sought to be taken, which is high above said 421-foot level.

Also that surrounding the said 2,476 acres, (which is carved out of the 3,300-acre **unit** farm of the defendants) are 800 additional acres that lie at an elevation of from 422 to 430 feet above sea level; and that this additional 800 acres not attempted to be taken, will be deprived of surface and subdrainage, by reason of the constant and permanent maintenance of said pool at 421 feet above sea level.

And that prior to the erection of this dam at Alton, the average level of the waters of the Illinois River, for 92 per cent of every year, was but 406 feet above sea level (one could almost wade across the Illinois River 92 per cent of the year), thereby affording a fall, under natural conditions, of fifteen feet for surface and subdrainage; and that by reason of the changed condition, the ground water table under said remaining 800 acres will be permanently raised to 421 feet and there constantly maintained.

And that from four to six feet of unsaturated soil, between the ground water table, and the top crop producing surface, are needed, for root penetration, to grow wheat and corn, which was the valuable use formerly made of said land.

That in consequence, all of said 800 acres varying in elevation between 422 and 430 feet above sea level, has been and will be seriously damaged by the permanent and fixed ground water table under it at the new elevation of 421 feet.

This evidence is uncontradicted, and is contained in the record (Vol. II, 840 to 881 and 939 to 971).

It was at **this** damage to **that** 800 acres, that the Court's instruction, and the exception thereto saved by the defendants, was directed (Vol. II, page 1012, 1018 and page 1019 and 1020).

III.

The Great Importance of the Questions Involved by This Probably Erroneous Decision.

The great importance of the questions we are presenting is due to the fact, that this case involved the interpretation of a **general** Federal law that has **not** been interpreted by **this** Court, upon which depend the legal rights of owners of **thousands** of acres of land on both banks of the Mississippi River, from the mouth of the Missouri River to Minneapolis, and likewise in the valley of the Illinois River from Grafton to Chicago; because, **acting** under **such** a construction of said **general** Act of April 24, 1888, said Secretary of War has undertaken to not only take IN FEE the lands of these defendants that are merely partially overflowed by this Alton pool, but has likewise instituted proceedings to take lands IN FEE on both banks of the **Mississippi** River for hundreds of miles between Alton and Minneapolis, and on the **Illinois** River, from Grafton to Chicago, which are **likewise** merely overflowed by the several pools formed by said many dams; and many proceedings are now pending before the Federal Courts in the Districts of Missouri, Illinois, Iowa, Wisconsin and Minnesota, wherein the **above** decision of this said United States Circuit Court of Appeals for the Seventh Circuit, is being used as a precedent, which said District Courts deem themselves required to follow; and involving **thousands** of acres of land merely damaged by said pools, and in which the Secretary of War is seeking the **fee-simple** title, under his contention, that he has **unlimited** legislative discretionary power, to take **any** land which in **his** discretion, is needed,

for said river and harbor improvement; and on information and belief, and particularly in view of the facts disclosed in this instant case, he is demanding a **fee-simple title**, not only to all lands that will be overflowed and be merely **damaged** by said pools, but also to all lands which **he thinks** it would be **advantageous** to the United States to acquire, with the purpose and intent of overflowing portions of them, and turning over the balance, to **other** departments of the Government, for recreational parks, (where they are **above** the level of the pool), and for wild life refuges, where they have long been used for duck-shooting purposes; and that, therefore, a proper construction of the said **general** law and of the said **special** Acts, authorizing **this** huge project, affecting the property of thousands of property owners, **should** be made by this Court, especially in view of the fact that the Act of April 24, 1888 has **never** been so interpreted by **any** Federal Court until this decision was rendered; and in further view of the fact, that the decision made by said Circuit Court of Appeals has probably been arrived at erroneously, in failing to give effect to, and to follow the applicable decisions of the Supreme Court of the United States, in construing and interpreting **general** laws, which are in conflict with **special** laws.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, and commanding the said Court to certify and send to this Court, a full and complete transcript of the record, and of the proceedings of the said Circuit Court of Appeals in case numbered 7148-7149, entitled on its docket "The United States of America, Plaintiff-Appellee, v. Amalie Meyer, Robert L. Meyer and Albert L. Meyer, Defendants-Appellants, to the end, that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; that the judgment herein of the said

Circuit Court of Appeals be reversed, and for such further relief as to the Court may seem proper.

Dated October 15th, 1940.

ROBERT L. MEYER,
Administrator of the Estate of Amalie Meyer, Deceased,
ROBERT L. MEYER,
ALBERT L. MEYER,
By FORD W. THOMPSON,
839 Paul Brown Building,
St. Louis, Missouri,
HENRY DAVIS,
Boatmen's Bank Building,
St. Louis, Missouri,
Attorneys for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

ROBERT L. MEYER, Administrator of the Estate of AMALIE MEYER, Deceased, ROBERT L. MEYER and ALBERT L. MEYER,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.
No. .....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit was rendered June 12, 1940 (Rec. Vol. II, page 1179). A motion for rehearing was filed in said court and taken under submission on June 27, 1940 (Rec. Vol. II, page 1193), and was denied by said Court July 23, 1940 (Rec. Vol. II, page 1209).

II.

JURISDICTION.

(a) The jurisdiction of this Court is invoked under Section 240-a of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 938, Sec. 1217, U. S. Compiled Accumulative Supp. 1925, 28 U. S. C. A. 347.

(b) The date of the judgment to be reviewed is June 12, 1940, and of the filing of the motion for rehearing, and the taking thereof under submission is June 27, 1940, and of its denial July 23, 1940.

(c) The fact showing jurisdiction has heretofore been set out in the petition, under the heading "Brief Statement of the Matter Involved."

(d) The judgment and decision of the Court of Appeals is set out (Vol. II, pages 1179 to 1191).

(e) The motion for rehearing filed in the Circuit Court of Appeals is set out in volume II, pages 1195 to 1207. The order of the Court of Appeals denying said motion for rehearing is set out at volume II, page 1209.

(f) The suggestion of death of defendant-appellant Amalie Meyer and the order of the Circuit Court of Appeals substituting her son, Robert L. Meyer, as administrator of the estate of Amalie Meyer, deceased, as defendant-appellant, in the place and stead of said Amalie Meyer, are both set out in volume II, pages 1176 and 1177.

III.

(a) On the question of a **proper** construction and interpretation to be placed upon a **general** Act of Congress, where there are subsequent **special** Acts, dealing with the subject

involved, (and in this instance, upon the Act of April 24, 1888, entitled "An Act to **Facilitate** the Prosecution of Works Projected for the Improvement of Rivers and Harbors" (25 Stat. 94), being Section 591 of Title 33, U. S. Code Annotated, and the **Special** Acts hereinbefore enumerated in said "Brief Statement of the Matters Involved," we direct attention to the following:

Townsend v. Little, 109 U. S. 504;
Rosecranz v. United States, 165 U. S. 257;
Rodgers v. United States, 185 U. S. 83;
Washington v. Miller, 235 U. S. 422.

(b) On the question of the exception taken to that portion of the instruction of the lower court, wherein the jury were directed that the Government was not liable for, and not required to compensate the owners, for the damage that might be done to the remaining 800 acres of defendants' land, due to permanently and constantly maintaining the natural level of the Illinois River to the high water mark, and that said defendants were **only** entitled to be compensated for any direct injury that was due to such permanent maintenance **above** the high water mark, and which instruction was held to be proper by the Court of Appeals (Vol. II, page 1191), we direct attention to the following cases:

U. S. v. Grizzard, 219 U. S. 180;
U. S. v. Cress, 243 U. S. 316;
U. S. v. Lynah, 188 U. S. 446;
U. S. v. C. B. & Q. Ry., 82 Fed. (2d) 131;
U. S. v. C. B. & Q. Ry., 90 Fed. (2d) 161.

Note: The last two cases above cited, reported in the Federal Reporter, involved **these very Acts** of Congress, authorizing **this** River and Harbor Project; one, reported in the 82 Fed. (2d), is the decision of the Circuit Court of Appeals for the **Eighth** Circuit, and the other, reported in

the 90 Fed. (2d), is the decision of **this** very **same** Circuit Court of Appeals for the **Seventh** Circuit; and on the question of damages, **each** of the said cases, involved damages to property not taken, but which would result from the **use** to be made by the Government of portion actually taken.

IV.

A brief statement of the case has been given in the petition under the headings "Brief Statement of the Matter Involved" and "Reasons Relied On for Allowance of the Writ," which, for brevity, we will here adopt.

SYNOPSIS OF THE ARGUMENT.

I.

(a) Your petitioners claim that in this particular River and Harbor Improvement, Congress, by the Act of April 24, 1888 (Title 33, Section 591, U. S. C. A.), merely selected the Secretary of War as the **proper** Government **officer,** authorized to institute condemnation proceedings in the name of the United States, for all River and Harbor Improvements, that it authorized to be prosecuted; and that such Act in and of itself, gave him no discretion whatsoever; and that the last eight words of said Act "for which provision has been made by law" when properly interpreted and construed, make it necessary to examine **each** special law, providing for a River and Harbor Project, in order to determine, WHAT land, right of way or materials, Congress deemed to be needed; and merely authorized the Secretary of War to condemn **such** land, as Congress has by such special law, either expressly, or impliedly, fixed as **necessary** for such project.

And that the Court of Appeals for the Seventh Circuit, has erroneously interpreted said Act, and is the first Federal Court to interpret it, as granting to the Secretary of War, **unlimited legislative** discretion, to condemn whatever land and right of way, or materials HE, in his own discretion, deems necessary for the project.

(b) That said Court of Appeals has also disregarded and given no proper consideration to the plain language of the several **special** Acts authorizing this particular project, which expressly direct, that this improvement shall be prosecuted, in accordance with the plans and recommendations of the Chief of Engineers and Board of Engineers for Rivers and Harbors, proposed and submitted to Congress, in the several **House Documents** specifically mentioned in

the enabling Acts of July 3, 1930, Public Resolution No. 10, 72nd Congress, and August 30, 1935; which said House Documents, the said Court of Appeals treated in its opinion, as mere "discussions of the legislation providing for improvements here concerned, between members of Congress and other Government officers," and held do not show an **intention** of Congress to limit, what the Court of Appeals interpreted to be, an unlimited legislative discretion granted the Secretary of War by the said Act of April 24, 1888.

(c) That said Court of Appeals has failed in construing and interpreting said **general** Act, and said special Acts of Congress, to follow the rulings of the Supreme Court of the United States applicable to the principle of construction and interpretation of a **general** law, when if standing alone, it will include the same matter as a **special** law, and thus conflict with it; and requiring that such **special** law shall always be considered an exception to the **general** law.

II.

That the charge to the jury excepted to by your petitioners is erroneous, which in substance announced, that the Government is not liable for any direct injury to the remaining portions of the unit farm property, which is inflicted upon that remaining portion, by the USE that it makes of the portion taken, if that use consists merely in changing and raising the natural flow and level of a navigable river, by constantly and permanently raising its level UP TO the high water mark; and that the Government is only liable for such a damage as is due to raising it **above** the high water mark.

That such an announcement of the law, is in direct conflict with the long-established decisions of this Court, and permits the taking of property without compensation.

ARGUMENT.

The statement of the questions involved, and of the reasons for granting the writ of certiorari, we will not enlarge upon, as we hope that we have made it clear in the brief summary contained in the petition.

A SUMMARY OF THE CASES CITED BY THE COURT OF APPEALS IN SUPPORT OF ITS RULING AND APPEARING AT VOLUME II, PAGE 1180.

An examination of the cases **cited** by the Court of Appeals in support of its conclusion, that the **general** Act of 1888 grants **unlimited** discretion to the Secretary of War, and that the **special** subsequent Acts, specifically authorizing this project, are to be treated as a mere "discussion of the legislation, between members of Congress and officers of the Government," discloses that **not one** of them ever attempts to interpret the scope and legal effect of the Act of April 24, 1888. They are set out in the opinion at page 1180 of volume II, and are the following:

1. Rindge Company v. County of Los Angeles, 262 U. S. 700.
2. Joslin Mfg. Co. v. City of Providence, 262 U. S. 668.
3. Sears v. The City of Akron, 246 U. S. 242.
4. Bragg v. Weaver, 251 U. S. 57.
5. Shoemaker v. U. S., 147 U. S. 282.
6. U. S. v. Gettysburg Electric Co, 160 U. S. 668.
7. Barnidge v. U. S., 101 Fed. (2d) 295.
8. U. S. v. Thelkeld, 72 Fed. (2d) 464.

The first, Rindge Company v. County of Los Angeles, deals with the Constitution and laws of the **State** of California, where lands had been condemned by the Board of

Supervisors of Los Angeles County, a **legislative** body of Los Angeles County, for a public road. The questions before the Court were **two**: First. Whether the **use** for which the lands were taken was a public use authorized by the law of **California**, and, second, whether the taking was necessary for such use.

The decision had nothing to do with the interpretation of the Federal law, and does not even mention, and, therefore, does not construe or interpret the Federal law of April 24, 1888.

The second, Joslin Manufacturing Co. v. The City of Providence, presents the question of whether or not, certain proceedings which were brought under an order of the **State** Legislature of the State of Rhode Island, purporting to authorize the City of Providence to obtain a supply of pure water, and which the plaintiff attempted to enjoin, claiming that it contravened the Fourteenth Amendment to the Constitution of the United States.

This case presented **no** facts dealing with Act of **Congress**, or authority under any Federal laws, and involved **merely** a question of whether the proceedings denied to the plaintiff due process of law. Of course, the general statute of April 24, 1888, was not even mentioned.

The third, Sears v. City of Akron, involved, in substance, the following: The State of Ohio had granted by a special law to the City of Akron the right to divert and use water power for the purpose of its water supply from certain rivers therein named. The City of Akron, already possessed under the general laws of Ohio, power to appropriate and condemn for city purposes, any property of any private corporation. The City of Akron, acting under that power, by resolution of its council, declared its intention to appropriate all the waters above a point fixed in one of those rivers, and by ordinance it appropriated the same and directed its solicitor to apply to the Court to assess

the compensation to be paid; and provided to pay such compensation out of the proceeds of bonds theretofore authorized.

A citizen of New York, John B. Sears, who was the holder and trustee of cetrain bonds that had been issued by a certain private hydroelectric corporation, organized under the general laws of Ohio, filed a suit to enjoin the City of Akron from carrying out the above, claiming that said hydroelectric company had the right of condemnation, and that if the city condemned the lands of certain riparian owners, that it would interfere with the future development and expansion of said hydroelectric company, and that the ordinance passed by the City Council, if enforced, is void, because violative of the Fourteenth Amendment to the Constitution, in that it authorizes the municipality to determine the necessity for the taking of private property, without the owners having an opportunity to be heard as to such necessity.

The above were the **sole** questions involved. The Federal Government was not interested, and no Federal officer was attempting to exercise any authority whatsoever, and, of course, the Act of April 24, 1888, was not even mentioned or considered.

The fourth, Bragg v. Weaver, was a suit wherein the owner of lands adjoining a public road in the State of Virginia sought an injunction against the taking of earth from his land, to be used in repairing the road. The taking was from the most convenient and nearest place where it could be attended by the least expense, and had the **express** sanction of the **statute** of the **State** of Virginia, and it was conceded that the taking was under the direction of the public officers, and for a public use, and also that adequate provision had been made for the payment of such compensation as may be awarded, and the objection against this statute is, that it makes no provision for affording the

owner an opportunity to be heard respecting the necessity or expediency of the taking, or the compensation to be paid. The Court held that where the intended **use** is public, the necessity and expediency of the taking may be determined by **such** agency and in such mode as the sovereign **State** may designate; that they are **legislative** questions, no matter who may be charged with their decision, and a hearing thereon is not essential to "due process," in the sense of the Fourteenth Amendment.

There was in that case, also, no necessity for, and no attempt made, to interpret a Federal law; the laws of the **State** of Virginia being **alone** involved. The Act of April 24, 1888, was, of course, not mentioned, and, therefore, was not interpreted.

The fifth, Shoemaker v. United States, the Court had before it **one** question, viz., **had** Congress the power to appropriate by condemnation, land in the District of Columbia for a public park in Washington, D. C. It was held that since **Congress** was exercising **that** power in the District of Columbia and not in a sovereign State (l. c. 298):

> "We are not called upon by the duties of this investigation to consider whether the alleged restriction on the power of eminent domain in the general Government, when exercised within the territory of a State, does really exist, or the extent of such restriction, for we are here dealing with an exercise of the power within the District of Columbia over whose territory the United States possesses not nearly the political authority that belongs to them as respects the States of the Union, but likewise the power 'to exercise exclusive legislation in all cases whatsoever over such districts.'"

The above case has no bearing **whatever** upon when, and under what circumstances, the **general** powers of the Secretary of War under the Act of April 24, 1888, shall **over-**

ride a **special** Act of Congress, and have significance, in determining the **extent** of lands to be acquired for a project.

The sixth, United States v. Gettysburg Electric Railway Company, is also far afield from the point under which it is cited and sheds no light whatever upon the **general** power of the Secretary of War under said Act of April 24, 1888. Quoting from Judge Peckham's opinion therein:

> "The really important question to be determined in these proceedings is whether the use to which the petitioner desires to put the land described in the petition is that kind of a public use for which the Government of the United States is authorized to condemn land. * * * 'Is the proposed use to which this land is to be put a public use within this limitation?' "

The Court decided that such **use** was a public use, and that **Congress** therefore had the power to authorize the condemnation of the land. There was no question as to the **amount** of land and the nature of the title, and estate that should be acquired, and therefore no necessity to refer to the **general** powers of the Secretary of War; and there was no leaving to the Secretary of War of a discretion or determination of **what** land, or how much land should be condemned. The Act of **Congress** was definite and certain, and the **sole** question of importance was whether the **use** was a public one.

The seventh, Barnidge v. United States, is likewise not in point and in no manner sheds any light upon **when** the **general** powers of the Secretary of War come into play, in determining the **extent** of the land authorized to be taken. The case is rather long, and, therefore, we will not summarize it. Furthermore, it did **not** involve the general powers of the **Secretary of War**, but was a condemnation suit instituted by the **Secretary** of the **Interior**, under an **express** power, granted under an Act of Congress of Au-

gust 21, 1935, Title 16, 461 U. S. C. A. ..., which declared that it is a national policy to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States. It goes on to enumerate the **special** power and discretion given to said Secretary of the **Interior**, and, under provision (d), states:

> "For the purpose of this chapter he may acquire in the name of the United States, by gift, purchase or otherwise, any property, personal or real, or any interest or estate therein, upon having obtained the President of the United States' executive order, approving that determination."

The sole question raised in the suit, was whether or not the Act of Congress granting the Secretary of the **Interior** such power, was constitutional, raised by an owner who resisted the condemnation on three grounds: First, that the Historic Sites Act did not authorize the condemnation of land; second, that the **use** for which the land was sought was not a public use, and, third, that the Historic Sites Act was an unconstitutional **delegation** of legislative power.

The decision made by this United States Circuit Court of Appeals for the Seventh Circuit, construing the said Act of April 24, 1888, as a delegation to the Secretary of War, of **unlimited** discretion, is the **only** decision that has ever been made to our knowledge (and we have carefully searched), construing or interpreting **that** Act.

We believe that a fair and reasonable construction and interpretation of that Act, taking into consideration the **language** of the title, "An Act to **Facilitate** the **Prosecution** of Works Projected for the Improvement of Rivers and Harbors" is that it was never intended thereby to do anything more than select the department of the Government, the Department of War, and the Secretary of War as the individual **servant** of Congress, who would be authorized to

bring suits in the name of the United States for any lands, or right of ways, or materials, which **Congress** deemed were needed, for a River and Harbor Improvement; and that, therefore, in order to ascertain **what** land, right of way or materials **Congress** deemed necessary for a River and Harbor Improvement, it is necessary to look at the **Special** Act, that **authorizes** such a project (which was the interpretation of Judge Brown in the case of the United States v. Certain Lands in the Town of Narragansett, 145 Fed. 654); and that, therefore, the Court of Appeals for the Seventh Circuit in this case, entirely misconceived the **true** meaning and effect of said Act of April 24, 1888, and seems to have made this decision, upon a very narrow interpretation of the word "needed," upon which it has held, that this Act gave to the Secretary of War, unlimited discretion to decide what land, right of way or material **is** "needed," to enable him to maintain, operate or prosecute this particular work for the improvement of the Mississippi and Illinois River; and that such an interpretation as is made by said United States Circuit Court of Appeals leaves **totally** out of consideration the last eight words of said Act **"for which provision has been made by law."**

In the interest of brevity, we will not here again refer to the legal effect that should be given to the language and provision of each of the **special** Acts authorizing **this** particular River and Harbor Project, and that they **clearly** show, and in plain language, that the War Department, the Secretary of War, the Chief of Engineers, the Board of Engineers for Rivers and Harbors, in **each** of the **proposals** which they made to Congress, and recommended to Congress, distinctly intended, that only "flowage easements" should be taken in the lands that would be **flooded** and **damaged** by the string of dams; and that in estimating the **cost** of the **entire** project in their proposals, they were clearly representing to Congress that they were to take **only** such "flowage easement"; and, therefore, that Con-

gress never expected or intended to permit the Secretary of War to condemn **in fee,** hundreds of miles of land on both banks of the Mississippi and Illinois Rivers, that was only to be submerged by said pools; and certainly never intended that the Secretary of War, when instituting this proceeding to acquire land for this project, should take land that would not be submerged, but might, nevertheless, be "advantageous to the United States," and other departments of the Government for Wild Life Refuges, Recreational Parks and sites for future Riverside Scenic Highways, nor did Congress intend to appropriate money for any such purpose.

We will not again review, or argue, the error of the instruction given the jury, because an examination of the cases we have cited clearly shows that the Government was liable for all damage that it did to the balance of this unit farm because of the injurious **use** that it made of the portion taken.

At pages 1190 and 1191 the Court has cited in support of its opnion a number of decisions of this Supreme Court in support of its contention:

> "That there is no taking from a riparian owner by the Government when water is raised to the ordinary high water mark for the purpose of improving navigation. Whatever rights the owner possesses below ordinary high water mark, are subordinate to the rights of the public * * *. Consequently nothing is due for impairment or use by the United States in the improvement of navigation of property within or over the bed of its navigable water. Intangible riparian rights are subject to the same servitude. Under the Fifth Amendment mere damage to land not taken is not compensable as an act under the power of eminent domain."

For a complete **answer** to the above statements, we direct

your Honors' attention to the opinion of the United States Circuit Court of Appeals for the **Eighth** Circuit, written by his Honor, Judge Faris, 82 Fed. (2d) 131 (which as heretofore stated herein we have cited) and wherein each, every and all of the cases now cited by the United States Court of Appeals for the Seventh Circuit, are carefully analyzed, and an exact opposite conclusion drawn by the Circuit Court of Appeals for the Eighth Circuit from that stated by this Circuit Court of Appeals for the Seventh Circuit.

CONCLUSION.

It will thus be seen that the questions presented for this Court's consideration are questions of great importance. The question of the proper interpretation of the Act of April 24, 1888, as to whether or not, when properly interpreted, it grants to the Secretary of War an unlimited discretion, and the question of whether or not the subsequent Special Acts of Congress authorizing the improvement of the Mississippi and Illinois Rivers, which specifically direct that the work shall be prosecuted "in accordance with the plans and recommendations contained in the several House Documents, 290, 137 and 184," are to be interpreted in the light of the plain language of said three above-named House Documents; or whether they are to be deemed "mere discussions between members of Congress and other officers of the Government," and, therefore, shed no light whatever upon the **intention** of Congress; and also the question of whether or not the liability of the Government to compensate for the injury done to the remaining lands of the defendants, not sought to be acquired, but which are directly damaged by the **use** which the Govenment is making of the portions taken, is in conflict with the previous decisions of this Court.

We, therefore, earnestly urge upon the Court to grant the

writ, and review this record, and settle the questions involved, and reverse the decision of the Court of Appeals.

Respectfully submitted,

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Attorneys for Petitioners.

INDEX

CITATIONS

274173—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 514, 515

ROBERT L. MEYER, AS ADMINISTRATOR, ETC., ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1179–1191) is reported in 113 F. (2d) 387.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered June 12, 1940 (R. 1192). A motion for rehearing was denied July 23, 1940 (R. 1209). The petition for writs of certiorari was filed October 17, 1940. The jurisdiction of this Court is invoked under Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in an action to condemn land pursuant to the Act of April 24, 1888, and the Act of August 30, 1935, the United States is authorized to condemn a fee where the Secretary of War has determined that a fee is necessary.

2. Whether the United States is liable for damage to land caused by raising the waters of a navigable stream permanently to ordinary high-water mark.

STATUTES INVOLVED

The Act of April 24, 1888, c. 194, 25 Stat. 94, 33 U. S. C. § 591, provides:

> The Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; * * *

The Act of August 30, 1935, c. 831, 49 Stat. 1028, 1034, 1035, provides:

> Be it enacted that the following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized, to be prosecuted under the direction of the Secretary of War and supervision of

the Chief of Engineers, in accordance with the plans recommended in the respective reports hereinafter designated and subject to the conditions set forth in such documents; * * * Mississippi River between Missouri River and Minneapolis; * * * Illinois waterway, Illinois; House Documents Numbered * * * 184, Seventy-third Congress;[1] * * *

STATEMENT

The United States filed its petition in the District Court for the Southern District of Illinois to condemn the fee to 2,476 acres of land owned by petitioners for use in connection with a dam on the Mississippi River, called Lock and Dam No. 26 (R. 2–45). This dam, located just below the confluence of the Mississippi and Illinois rivers, creates a pool which extends up both of the rivers. Since the pool is several feet above the natural ordinary high-water level, the closing of the dam had inundated riparian land in both the Mississippi and Illinois River valleys. The improvement, of which Lock and Dam No. 26 is a part, was authorized by the Act of August 30, 1935 (c. 831, 49 Stat. 1028, 1034, 1035). The condemnation proceeding was instituted at the request of the Secretary of War, who advised the Attorney General that creation of the pool required acquisition of the fee to petitioners' land (R. 6, 64). Petitioners

[1] Other congressional documents are referred to in this Act, but are not relied upon by petitioners.

filed a cross petition asking damages for alleged injuries to the balance of their lands which the Government did not seek to condemn (R. 158–161).

In the course of its charge the trial court instructed the jury as follows (R. 1017–1018):

> I now direct you to another matter, namely, the claims of the defendant owners [petitioners] relative to the direct damage due to said dam and pool which may be suffered by their lands and improvements not taken and that surround and adjoin said seven tracts taken.
>
> Therefore, I further charge you that it is fully established that the said Lock and Dam No. 26, located in the Mississippi River at its site at Alton, is capable of holding and raising the natural elevation of the waters of the Mississippi River at the dam site at Alton to a maximum elevation of 419 feet above sea level; also, that it is capable of creating a pool behind said dam and constantly maintaining that pool at 419 feet elevation at Alton. * * *
>
> You are further instructed that under the Constitution of the United States, and the amendments thereto, providing for just compensation to be paid to the owners for private property taken for public use, that such just compensation consists of not only a just award for the value of the property which is actually taken, but also for an award for any and all damage that may directly result to the portions of the tract and the valuable improvements thereon that

> remain, where that portion that remains is a part of the same tract which the Government takes away from the owner, * * *
>
> Concerning the question of damages caused by the raising of the water of the river up to the ordinary high water mark, the Government is not liable. However, for damages caused a riparian owner from the raising of the water above the high water mark, it is liable. Therefore, it is only such damages as are caused by the raising of the water levels above high water mark that the Government must make recompense or reparation.

Petitioners excepted to the last paragraph quoted (R. 1019–1020).

There was a verdict for $66,750 as compensation for the land taken and for the damage to the remaining land (R. 1125–1134) and judgment was entered accordingly (R. 1142–1152). The Circuit Court of Appeals affirmed (R. 1192–1193).

ARGUMENT

1. Petitioners attack the Government's authority to acquire a fee to their lands. The Act of April 24, 1888, empowered the Secretary of War to cause the institution of proceedings to condemn "any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers". Thus Congress confided to the Secretary of War the determination of what lands or interest in lands were necessary

for the maintenance of Lock and Dam No. 26. *United States* v. *Certain Lands in Town of Narragansett,* 145 Fed. 654 (D. R. I.). In the absence of bad faith, his decision that a fee to petitioners' lands was necessary is conclusive. *Shoemaker* v. *United States,* 147 U. S. 282, 298; *United States* v. *Gettysburg Electric Ry.,* 160 U. S. 668, 685; *Barnidge* v. *United States,* 101 F. (2d) 295 (C. C. A. 8th).

Petitioners contend (pp. 8–13, 16–17, 24–25, 27–28, 35–37), however, that the Act of August 30, 1935, limited the Secretary of War to the acquisition of flowage easements. The contention is without substance. The unqualified authorization of the 1888 Act is not touched by the direction of Congress in the 1935 Act that the authorized work is to be prosecuted "in accordance with the plans recommended in" the House Documents mentioned and "subject to the conditions set forth" in those documents. The references to "flowage," "flowage damage," and "flowage easements," quoted (pp. 11–13) by petitioners from House Document No. 184, fall far short of establishing a modification of the authority conferred upon the Secretary by the 1888 Act. House Document No. 184 discussed the proposed improvements from an engineering and commercial standpoint. It did not deal with the manner in which the lands necessary therefor were to be acquired or with the interest in such lands which would be needed.

Petitioners also assert (pp. 4–5, 14–16, 36) that if the Secretary of War had authority to determine what title was necessary, his determination in the present instance was made in bad faith and constituted an abuse of discretion. However, as the court below held (R. 1181):

> The evidence in the record, including that tendered by defendants, tends to disclose only a difference in judgment as to the necessity of a fee simple title,—nothing in the way of abuse of discretion. Furthermore in their cross complaint defendants averred that the possession of the Government "would completely destroy" the lands "by the operation of the dam." If there was a complete taking or destruction of defendants' property, *it would seem obvious that a fee simple title was requisite.* [Italics supplied.]

2. Unquestionably, as petitioners state (pp. 17–18), the exercise by Congress of its authority to improve navigation is subject to the prohibition of the Fifth Amendment against the taking of private property for public use without just compensation. *United States* v. *Lynah,* 188 U. S. 445, 465, 471; *United States* v. *Cress,* 243 U. S. 316, 319–320. Petitioners are also correct in saying (pp. 18, 25–26, 36–37) that the compensation to be awarded under the Fifth Amendment for an actual physical taking of part of a tract of land includes not only the value of that which is taken but also the dam-

age resulting to the remainder from such taking. *United States* v. *Grizzard,* 219 U. S. 180, 183; *United States* v. *Chicago, B. & Q. R. Co.,* 82 F. (2d) 131, 134–136 (C. C. A. 8th); *United States* v. *Chicago, B. & Q. R. Co.,* 90 F. (2d) 161, 167–168 (C. C. A. 7th), certiorari denied, 302 U. S. 714. As has been shown (pp. 4–5), the trial court so instructed the jury.

These principles, however, give no support to petitioners' contention (pp. 7, 8) that the trial court erred in further instructing the jury that the United States was not liable for damage caused to petitioners' remaining land by the maintenance of the river level at the ordinary high-water mark. Petitioners cite no case so holding and we have found none. Land below the high-water mark is subject to a servitude for navigation. *Willink* v. *United States,* 240 U. S. 572, 580. Intangible riparian rights are subject to the same servitude. Thus compensation need not be made when an improvement to navigation cuts off a riparian owner's access to the river (*Scranton* v. *Wheeler,* 179 U. S. 141; *Gibson* v. *United States,* 166 U. S. 269) or diverts a navigable stream so that it undercuts the owners' banks. *Bedford* v. *United States,* 192 U. S. 217. Obviously, that servitude does not cease when adjoining lands are taken. Cf. *Campbell* v. *United States,* 266 U. S. 368, 371. Therefore, the courts below were clearly correct in restricting petitioners to compensation for damage caused by

raising the river above the ordinary high-water mark.

CONCLUSION

The decision of the Circuit Court of Appeals is correct and presents neither a conflict of decisions nor a question of general importance. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940